pletes the assets of a business engaged in interstate commerce conclusively establishes the effect on commerce requirement—was incorrectly applied here in light of the plumbers' testimony that the payments they made to [petitioners] did not in fact affect their ability to engage in interstate commerce." *Id.* at 12. The court of appeals rejected petitioners' challenges to both the jury instructions and the sufficiency of the evidence. *Id.* at 12-22.

The court of appeals first reviewed its decisions over the past 30 years, in which it had repeatedly approved the "depletion of assets" method of proving an effect on commerce under the Hobbs Act. See Pet. App. 13-17. The court noted the intent of Congress, in enacting the Hobbs Act, to exercise its full constitutional authority to penalize interference with interstate commerce. See *id.* at 15 (citing *Stirone* v. *United States*, 361 U.S. 212, 215 (1960)). Based on its review of prior decisions, the court of appeals found "little doubt that [the court's] precedent supports the District Court's use of 'potential' effect and its formulation of the depletion of assets theory in the jury instructions." *Id.* at 17.

The court of appeals rejected petitioners' contention that this Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *Jones* v. *United States*, 529 U.S. 848 (2000), required a different result. See Pet. App. 19-20. The court noted that it had "already rejected the argument that *Lopez* and its progeny require proof of a 'substantial effect' on commerce in an individual case in order to show a Hobbs Act violation." *Ibid.* The court further explained that, so long as the cumulative impact on interstate commerce of many Hobbs Act violations is substantial, the statute is a constitutional exercise of Con-

gress's Commerce Clause power, notwithstanding the de minimis effect on commerce of the defendant's conduct in an individual case. *Id.* at 20 (citing *Lopez*, 514 U.S. at 558-559).

The court of appeals also concluded that the evidence in this case was "more than sufficient" to show the required impact on commerce. Pet. App. 22. The court noted the "ample evidence that * * * each [petitioner] took payments from plumbers who were engaged in interstate commerce, i.e., who purchased supplies made out-of-state." *Ibid.* The court of appeals also rejected numerous other challenges to petitioners' convictions, see *id.* at 22-54, but it vacated each petitioner's sentence and remanded for resentencing in accordance with this Court's decision in *Booker*, *id.* at 54-55.

ARGUMENT

Petitioners contend (05-111 Pet. 6-23; 05-5412 Pet. 7-22) that the district court incorrectly instructed the jury on the interstate-commerce element of their Hobbs Act extortion offenses by allowing a potential effect on interstate commerce to suffice. They argue that conviction for a substantive Hobbs Act violation requires proof of an actual effect on commerce in the individual case. The court of appeals' decision approving the depletion-of-assets theory as a valid basis of showing that an extortion affected interstate commerce is correct and consistent with the holdings of this Court and of other circuits that have addressed the issue. Even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle to consider it because petitioners' own proposed jury instructions endorsed the depletion-of-assets theory of Hobbs Act liability, and because any error in the instructions on that

theory is harmless beyond a reasonable doubt. Further review is therefore not warranted.

1. Petitioners' claim that the jury instruction approved by the court of appeals is inconsistent with the text of the Hobbs Act lacks merit.

a. The Hobbs Act makes it a federal crime to commit an act of extortion (or attempt or conspire to do so) that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). That broad jurisdictional language demonstrates "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone*, 361 U.S. at 215; see *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393, 408 (2003).

Both before and after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the Hobbs Act has been uniformly construed to prohibit the illegal interference in any manner whatever with interstate commerce, even when the effect of such interference or attempted interference is slight. As the Second Circuit has explained:

> Our cases have long recognized that the jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. * * *
>
> * * * We now expressly hold that *Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. * * * [O]ur sister Circuits that have addressed this question have all so held.

United States v. *Farrish*, 122 F.3d 146, 148 (2d Cir. 1997) (brackets and internal quotation marks omitted), cert. denied, 522 U.S. 1118 (1998).

In keeping with that analysis, courts of appeals have consistently upheld Hobbs Act convictions where acts of robbery depleted the assets of commercial enterprises. See, *e.g.*, *United States* v. *Curtis*, 344 F.3d 1057, 1070 (10th Cir. 2003) (robberies of stores and restaurants), cert. denied, 540 U.S. 1157 (2004); *United States* v. *Gray*, 260 F.3d 1267, 1272-1277 (11th Cir. 2001) (robbery of restaurant), cert. denied, 536 U.S. 963 (2002); *United States* v. *Smith*, 182 F.3d 452, 454, 456-457 (6th Cir. 1999) (robberies of grocery and party stores), cert. denied, 530 U.S. 1206 (2000); *United States* v. *Arena*, 180 F.3d 380, 389-391 (2d Cir. 1999) (robbery of medical facilities), cert. denied, 531 U.S. 811 (2000); *United States* v. *Vong*, 171 F.3d 648, 654 (8th Cir. 1999) (robbery of jewelry stores); *United States* v. *Hebert*, 131 F.3d 514, 518, 520-524 (5th Cir. 1997) (robberies of bank, restaurant, and liquor stores), cert. denied, 523 U.S. 1101 (1998); *United States* v. *Harrington*, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (robbery of restaurant); *United States* v. *Atcheson*, 94 F.3d 1237, 1243 (9th Cir. 1996) (robbery of Automatic Teller Machine (ATM) cards and use of ATMs to withdraw cash), cert. denied, 519 U.S. 1156 (1997).

b. Contrary to petitioners' contention (05-111 Pet. 11-16; 05-5412 Pet. 11-15), the depletion-of-assets theory is fully consistent with the text of the Hobbs Act. This Court has long recognized that the broad language of the Act, which forbids extortion or robbery that "in any way or degree obstructs, delays, or affects commerce," 18 U.S.C. 1951(a), reflects Congress's intent to exercise the full scope of its power under the Commerce Clause.

Stirone, 361 U.S. at 215. When robbery or extortion depletes the assets of a business entity, thereby diminishing its capacity to purchase goods or services in interstate markets, the criminal conduct is properly characterized as "affect[ing]" commerce, whether or not the victimized enterprise is shown to have forgone any particular purchase. Indeed, even if it were undisputed in a particular case that the victimized business's purchasing decisions were *not* altered by the loss of funds, the business would be required to account for that loss in some other manner—*e.g.*, by passing the cost along to its customers through increased prices, or by accepting a diminution of its profits—and any such response would itself qualify as an effect on commerce.[3]

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[3] Contrary to petitioners' contention (05-111 Pet. 15; 05-5412 Pet. 15), acceptance of the depletion-of-assets theory, and of potential impacts on interstate commerce as sufficient to establish the Hobbs Act's commerce nexus, does not render the Act's jurisdictional element a "nullity or mere surplusage." The courts of appeals that have endorsed the depletion-of-assets theory have nevertheless overturned Hobbs Act convictions, typically when the victim was an individual rather than a commercial entity, after finding that the impact on commerce was too attenuated or speculative to establish the Act's jurisdictional element. See *United States* v. *Perrotta*, 313 F.3d 33, 36-40 (2d Cir. 2002) (reversing Hobbs Act conviction for extortion of individual where only commerce nexus was victim's employment by company engaged in interstate commerce); *United States* v. *Peterson*, 236 F.3d 848, 851-857 (7th Cir. 2001) (reversing Hobbs Act conviction for robbery of marijuana dealer in absence of showing that victim's drug business was interstate in nature); *United States* v. *Wang*, 222 F.3d 234, 237-240 (6th Cir. 2000) (reversing Hobbs Act conviction for robbery of individual in private home); *United States* v. *Quigley*, 53 F.3d 909, 910-911 (8th Cir. 1995) (reversing conviction for robbery of individuals on their way to purchase beer at a convenience store); *United States* v. *Collins*, 40 F.3d 95, 99-101 (5th Cir. 1994) (reversing Hobbs Act conviction for robbery of individual where only asserted

2. Petitioners' claim of a circuit conflict on the meaning of the Hobbs Act lacks merit and does not warrant review.

a. As the Third Circuit recognized, see Pet. App. 17-19 n.3 (citing cases), the courts of appeals agree that the depletion-of-assets theory is a valid method of proving the interstate-commerce element of a Hobbs Act charge. The gravamen of that theory is that, if a commercial entity regularly makes purchases in interstate commerce, a jury may properly infer that reduction of the business's funds through robbery or extortion may reduce its capacity to engage in its usual interstate transactions, thereby establishing the requisite effect on interstate commerce, whether or not the proof at trial identifies any particular purchase that the business has forgone. See, *e.g.*, *United States* v. *Bailey*, 227 F.3d 792, 798 (7th Cir. 2000) (under depletion-of-assets theory, "the government shows that commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods") (citations and internal quotation marks omitted).

Petitioners' claimed circuit conflict (see 05-111 Pet. 7-8; 05-5412 Pet. 8-9) on the sufficiency of a potential effect on commerce under the Hobbs Act is more semantic than real. Those courts that have made statements suggesting that a potential effect on commerce is not

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commerce nexus was interference with victim's ability to attend a business meeting and make cellular phone calls), cert. denied, 514 U.S. 1121 (1995); *United States* v. *Buffey*, 899 F.2d 1402, 1403-1407 (4th Cir. 1990) (reversing Hobbs Act conviction for conspiracy to extort small amount of money from a wealthy individual).

sufficient have nevertheless endorsed the depletion-of-assets theory, and each of them has rendered other decisions that support the proposition that proof of a potential impact on commerce will suffice.

Petitioners rely (05-111 Pet. 7; 05-5412 Pet. 8) on *United States* v. *Williams*, 308 F.3d 833, 837-838 (2002), in which the Eighth Circuit held that the district court had erred by instructing the jury that it could find the defendant guilty based on a probable or potential effect on commerce. The court in that case nevertheless affirmed the Hobbs Act conviction, finding the error harmless where uncontroverted evidence supported the conclusion that there were actual effects on commerce from the robbery of a taxicab driver. *Id.* at 838. In a prior case, moreover, the Eighth Circuit stated that, "[a]lthough a probability of affecting commerce is sufficient in some cases, like extortion cases involving the depletion-of-assets theory, the probability must be realistic rather than merely speculative." *United States* v. *Quigley*, 53 F.3d 909, 910 (8th Cir. 1995). Thus, for cases like this one—extortion cases involving the depletion-of-assets theory—the Eighth Circuit has found a showing of a potential or probable effect on commerce sufficient to satisfy the statute. Any inconsistency between the views expressed in *Williams* and *Quigley* is appropriately resolved by the Eighth Circuit rather than by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Petitioners also rely (05-111 Pet. 8; 05-5412 Pet. 9) on the Sixth Circuit's statement in *United States* v. *DiCarlantonio*, 870 F.2d 1058, 1061, cert. denied, 493 U.S. 933 (1989), that "a substantive Hobbs Act violation requires an actual effect on interstate commerce." More recently, however, the Sixth Circuit has approved the

depletion-of-assets theory, as well as the view that a "realistic probability" of an effect on commerce will suffice. See *United States* v. *Turner*, 272 F.3d 380, 385 n.2 (2001) (government can establish the requisite de minimis effect on commerce by proving depletion of the victim's assets, thereby showing a reduction of the potential interstate purchasing power of the business); *United States* v. *Wang*, 222 F.3d 234, 237 (6th Cir. 2000) (no requirement of actual effect on commerce; realistic probability of effect on commerce will satisfy Hobbs Act). Those more recent statements suggest that the Sixth Circuit would not disagree with the Third Circuit's disposition of this case. Here again, any tension among the Sixth Circuit's Hobbs Act cases is appropriately resolved by the court of appeals itself. *Wisniewski*, 353 U.S. at 902.

Petitioners also rely (05-111 Pet. 8; 05-5412 Pet. 8-9) on two decisions of the Eleventh Circuit. That court has stated that a potential impact is sufficient in attempt or conspiracy prosecutions, but that a substantive offense requires an "actual, de minimis" effect. *United States* v. *Carcione*, 272 F.3d 1297, 1300-1301 n.5 (11th Cir. 2001); see *United States* v. *Le*, 256 F.3d 1229, 1232 (11th Cir. 2001), cert. denied, 534 U.S. 1145 (2002). In other decisions, however, the Eleventh Circuit has repeatedly approved the depletion-of-assets theory, and it has stated that the Hobbs Act was intended to protect commerce from effects that are "direct or indirect, actual or potential, beneficial or adverse." *Gray*, 260 F.3d at 1276; see *United States* v. *Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000), cert. denied, 531 U.S. 1099 (2001); *United States* v. *Kaplan*, 171 F.3d 1351, 1357 (11th Cir.) (en banc), cert. denied, 528 U.S. 928 (1999). It is therefore far from clear that the Eleventh Circuit would disap-

prove the interstate-commerce instruction given at petitioners' trial under the circumstances of this case.

b. Even if the nature of the commerce nexus required to establish criminal liability under the Hobbs Act otherwise warranted clarification by the Court, this case would provide an unsuitable vehicle for resolution of the interpretive question. In the district court, petitioners did not request an instruction that the government was required to prove an "actual" effect on interstate commerce, nor did they question the propriety of the depletion-of-assets theory. To the contrary, petitioner O'Malley specifically requested an instruction stating that "[i]nterstate commerce is affected when an enterprise which purchases goods in interstate commerce has assets depleted by extortion. The government needs to prove the realistic probability of asset depletion in order to prove an effect on interstate commerce." O'Malley C.A. Br. 3[illegible]. Other petitioners joined in that request. See Jackson C.A. Br. 24, 26; Tursi C.A. Br. 56. Absent a contemporaneous request for the sort of interstate-commerce instruction that petitioners now argue should have been given, the question presented does not warrant this Court's review.

c. Even apart from the theory that the depletion of assets caused by the extortionate payments reduced the victimized plumbers' capacity to make interstate purchases, the evidence at trial—which the jury necessarily accepted in finding petitioners guilty—establishes an alternative basis for finding the Hobbs Act's commerce element to be satisfied. "There was ample evidence at trial that plumbers paid inspectors in order to ensure timely and favorable inspections, and to prevent unfavorable treatment or harassment by inspectors." Pet. App. 7-8 (footnote omitted). By making the unimpeded

conduct of the plumbers' commercial activities contingent on the extorted payments, petitioners "obstruct[ed]" and "affect[ed]" commerce within the meaning of the Hobbs Act, even though the plumbers' submission to the extortionate scheme prevented more tangible disruption of their businesses. In *Stirone*, this Court addressed and approved a similar theory:

> Had Rider's business been hindered or destroyed, interstate movements of sand to him would have slackened or stopped. The trial jury was entitled to find that commerce was saved from such a blockage by Rider's compliance with Stirone's coercive and illegal demands. It was to free commerce from such destructive burdens that the Hobbs Act was passed.

361 U.S. at 215.[4] Accordingly, even if there were error in the jury instructions with respect to the depletion-of-assets theory, any such error was harmless beyond a reasonable doubt because the jury necessarily found

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[4] As the Seventh Circuit recognized 30 years ago,

> [a]n effective prohibition against blackmail must be broad enough to include the case in which the tribute is paid as well as the one in which a victim is harmed for refusing to submit. Since the payment would normally enable the business to continue without interruption, the inference is inescapable that Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect.

United States v. *Staszcuk*, 517 F.2d 53, 57 (7th Cir.) (en banc) (Stevens, J.) (footnotes omitted), cert. denied, 423 U.S. 837 (1975); accord *United States* v. *Rivera Rangel*, 396 F.3d 476, 485 (1st Cir. 2005) (extortion had a "'realistic probability' of affecting interstate commerce because, had [the victim] refused to pay, [the defendant] may have caused his business to suffer and, in so doing, indirectly caused him to purchase fewer materials from the mainland United States").

facts supporting an alternative theory. *Neder* v. *United States*, 527 U.S. 1 (1999).[5]

3. Petitioners contend (05-111 Pet. 16; 05-5412 Pet. 15) that, as interpreted by the court of appeals, the Hobbs Act "effectively federalizes all extortion, no matter how local." Relying on *Jones* v. *United States*, 529 U.S. 848 (2000), petitioners argue (05-111 Pet. 16-22; 05-5412 Pet. 15-21) that the Act should be more narrowly construed in order to avoid potential constitutional difficulties. Petitioners' reliance on *Jones* is misplaced.

In *Jones*, this Court held that the federal arson statute, which prohibits damage or destruction by means of fire or explosive to "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i), did not apply to the arson of a private, owner-occupied residence not used for any commercial purpose. 529 U.S. at 854-857. The Court recognized, however, that the arson statute broadly protects property used in a commercial activity. *Id.* at 855-856. In contrast to the arson of a residence at issue in *Jones*, petitioners' extortion of commercial entities whose assets were used to purchase supplies in interstate commerce implicates the core concern that prompted Congress to enact the Hobbs Act. Nothing in *Jones* suggests that the Court should overturn its long-standing broad interpretation of the Hobbs Act, see *Stirone*, *supra*, to avoid constitutional doubts. Nor do *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United*

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[5] Indeed, the alleged error would be harmless even under the dissent's theory in *Neder*. See 527 U.S. at 35 (Scalia, J., concurring in part and dissenting in part) ("Where the facts *necessarily found* by the jury * * * support the existence of the element omitted or misdescribed in the instruction, the omission or misdescription is harmless.").

States v. *Morrison*, 529 U.S. 598 (2000), see 05-111 Pet. 16; 05-5412 Pet. 16, suggest that Congress lacks power to punish financial crimes in which the victim is a commercial actor. And, as the cases discussed above (see note 3, *supra*) make clear, acceptance of the depletion-of-assets theory has not led the courts of appeals to construe the Hobbs Act as indiscriminately covering every act of extortion committed within this country.[6]

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[6] Petitioners are also incorrect in contending (05-111 Pet. 21; 05-5412 Pet. 20) that the courts below created a mandatory presumption that relieves the government of actually proving the jurisdictional element. The district court instructed the jury that the depletion of assets of a business engaged in interstate commerce would satisfy the Hobbs Act's jurisdictional element (Pet. App. 11a), but that instruction did not relieve the jury of finding an essential element of the crime. The government was required to prove that the victimized businesses were engaged in interstate commerce or purchased supplies that came from interstate commerce, and that the assets of those businesses were depleted by the extortionate payments. It is well settled that the trial court does not invade the province of the jury by instructing it that certain facts, if proved, would satisfy the interstate-commerce element. Such an instruction is consistent with the fundamental rule that the court instructs on the law and the jury decides the facts. See *United States* v. *Miles*, 122 F.3d 235, 239-240 (5th Cir. 1997), cert. denied, 523 U.S. 1011 (1998); *United States* v. *Smith*, 101 F.3d 202, 215 (1st Cir. 1996), cert. denied, 520 U.S. 1160 (1997); *United States* v. *O'Malley*, 796 F.2d 891, 897-898 (7th Cir. 1986).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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